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Via Overnight Mail

October 14, 2016

Honorable Chief Justice Tani G. Cantil-Sakauye
Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102-4797

RE: Request for Depublication
Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.
Court of Appeal of California, First Appellate District, Division Two
Case No. A139610, filed August 17, 2016

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.1125, the California State Teachers' Retirement Board (the Board) respectfully requests that the California Supreme Court depublish *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674 (*Marin*). The California Constitution requires the Board to administer the California State Teachers' Retirement System (CalSTRS) solely in the interest of its participants and their beneficiaries, explicitly providing that this obligation "shall take precedence over any other duty." In administering CalSTRS and providing benefits to its members, it is critical for the Board to understand the legal nature and extent of vested pension rights, including the applicability and framework of "comparable new advantages."

For example, Assembly Bill 1469, codified in Education Code section 22002.5, and effective only two years ago on June 24, 2014, was negotiated under the guidelines first established by the California Supreme Court in *Allen v. Long Beach* (1955) 45 Cal.2d 128. Hundreds of thousands of California's educators relied upon decades of legal precedent when agreeing to the "disadvantage" of increasing their contributions in order to help fund the Defined Benefit Program, receiving in return the "comparable new advantage" of removing the statutory right to adjust the improvement factor, "thereby establishing the improvement factor as a contractually enforceable promise." (See Ed. Code, § 22002.5.)

The recent holding in *Marin* undermines this Court's prior decisions and creates considerable uncertainty for the Board, CalSTRS, and its members. If the decision remains published, the Board will grapple with vested pension rights issues.

In *Marin*, the Court of Appeal, First Appellate District, Division Two, held that any new modifications to a public employee's pension benefits that result in disadvantages to the employee need not be accompanied by comparable new advantages so long as the public employee is still entitled to a "reasonable" pension. To reach its conclusion, the *Marin* court converted a required consideration into a discretionary one, and in so doing, incorrectly interpreted and reversed over sixty years of California Supreme Court precedent. Furthermore, the decision will provide misguided precedent for a broad spectrum of future cases involving California pension and vested rights jurisprudence, and create an enormous amount of uncertainty for the courts, legislators, those charged with administering pension systems, and California's public employees.

The dispute in *Marin* stems from the Legislature's amendment to Government Code section 31461[1], which excluded specified items (such as payments for additional services, reimbursements, and executive bonuses) from the calculation of an employee's "compensation earnable." According to the *Marin* court, the purpose of the amendment was to curb pension "spiking," the practice of increasing an employee's defined benefit retirement allowance by increasing his or her final compensation, typically done by including various non-salary items.

The Court of Appeal ultimately held that the Legislature did not act impermissibly by amending Section 31461, and the Marin County Employees' Retirement Association's (MCERA) implementation of the change did not amount to "an impairment of the employee's receipt of a 'reasonable' pension upon retirement." (*Marin, supra*, 2 Cal.App.5th at pp. 679-680.)

In reaching its holding, however, the Court of Appeal embarks on a myopic expedition through over sixty years of firmly entrenched Supreme Court law, ultimately concluding that "*There Is No Absolute Requirement That Elimination or Reduction of an Anticipated Retirement Benefit 'Must' Be Counterbalanced by a 'Comparable New Benefit*'" (*Marin, supra*, 2 Cal.App.5th at p. 697, italics in original), a result that directly contravenes the holdings of this Court and the Court of Appeal.

I. When Determining Whether an Impairment to a Vested Pension Right is Reasonable, This Court Has Consistently Required that Any Disadvantages to a Pension Benefit Must Be Accompanied By Comparable New Advantages

The legal phrase "comparable new advantages" is first used by the California Supreme Court in *Allen v. Long Beach* (1955) 45 Cal.2d 128. There, this Court acknowledged that "[a]n employee's vested contractual pension rights may be modified" as long as such modifications are "reasonable." (*Id.* at p. 131.) This Court applied a two part test for determining whether a modification would be "sustained as reasonable": (1) "alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation";

[1] All future references are to the Government Code, unless otherwise indicated.

(2) "and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Ibid.*)

Notably, this Court uses the word "should" instead of "must" in the second prong of the test. In *Marin*, the Court of Appeal highlights this distinction to all but eliminate the "comparable new advantages" requirement. However, the Court of Appeal ignores the salient fact that this Court, in *Allen v. Long Beach* and over the following sixty years, *always evaluates* whether comparable new advantages did accompany changes in the pension plan when it analyzes the facts of a particular case. In other words, *this Court treats the second prong as mandatory*, not discretionary. This makes abundant sense, especially because the bar for the test's first prong is extremely low, and rarely examined by the court. Thus, the test for determining whether modifications to an employee's vested contractual pension rights are "reasonable" hinges almost exclusively upon the second prong: whether any disadvantages are accompanied by comparable new advantages. The decisions of this Court over the past sixty years confirm this point.

In *Allen v. Long Beach*, despite its use of "should," this Court held several pension changes invalid for failure to offer comparable new advantages: "The provision raising the rate of an employee's contribution to the city pension fund from 2 per cent of his salary to 10 per cent obviously constitutes a substantial increase in the cost of pension protection to the employee without any corresponding increase in the amount of the benefit payments he will be entitled to receive upon his retirement" and "there appears to be no reasonable justification for requiring contributions from employees returning from military service when no comparable provision is made affecting employees returning from leaves of absence granted for other purposes." (*Allen v. Long Beach*, *supra*, 45 Cal.2d at pp. 131-133, underscore added.)

A few years later, in *Abbott v. Los Angeles*, this Court again employed the *Allen v. Long Beach* test, evaluating whether modifications to pension payments were accompanied by comparable new advantages, and concluding that they were not: "Despite the language of the above cases which clearly shows that it is advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured, defendants urge that new overall advantages … were sufficient to offset the disadvantage brought about by substituting a fixed for a fluctuating pension…" This Court further held that modifications that eliminated the requirement that a widow must have been married to a member in the line of duty for one year, "while undoubtedly an advantage for certain widows of members, cannot seriously be considered as commensurate to the detriments imposed, particularly by the change from a fluctuating to a fixed pension." (*Abbott v. Los Angeles* (1958) 50 Cal.2d 438, 447-455, underscore added.)

This Court continued its application of the second prong in *Betts v. Board of Administration of Public Employees' Retirement System*, holding an amendment that reduced pension benefits for a former state treasurer invalid for failure to provide comparable new advantages: "Under these circumstances, the 1963 enactment cannot be deemed a 'comparable new advantage' offsetting the detriment represented by amendment of section 9359.1 in 1974. […] We therefore conclude that the 1974 amendment to section 9359.1 cannot constitutionally be applied to petitioner, because the amendment withdraws benefits to which he earned a vested contractual right while employed. No 'comparable new advantages' to petitioner appear in the plan which can offset the

detriment he has suffered by replacement of a 'fluctuating' system of benefit computation with a 'fixed' system." (*Betts v. Board of Administration of Public Employees' Retirement System* (1978) 21 Cal.3d 859, 863-868, underscore added.)

Consistent with *Allen*, *Abbott*, and *Betts*, this Court, in *Olson v. Cory*, when presented with modifications of pension benefits that limited increases in judicial salaries, once again analyzed whether the disadvantages were accompanied by comparable new advantages, holding that the modification: "works to the disadvantage of judicial pensioners by reducing potential pension increases, and provides no comparable new benefit. Again, we conclude that defendants have failed to demonstrate justification for impairing these rights or that comparable new advantages were included and that section 68203 as amended is unconstitutional as to certain judicial pensioners."[2] (*Olson v. Cory* (1980) 27 Cal.3d 532 [609 P.2d 991, 996], underscore added.)

This Court last applied the *Allen v. Long Beach* test in *Legislature v. Eu* (1991) 54 Cal.3d 492. In *Eu*, this Court explicitly characterized the comparable new advantages prong as mandatory: "the state as employer is permitted to make reasonable modifications to the pension system during the employment relationship, so long as employees receive 'comparable new advantages' in return for any substantial reduction in benefits." (*Id.* at p. 529, underscore added.) In applying the second prong, the *Eu* court rejected the argument that the "transfer" or "redirection" of pension funds to the federal Social Security system operates as a "comparable new advantage." (*Id.* at p. 530.) Instead, the Court agreed with the petitioners that "the anticipated federal benefits will be far less than those provided by the [Legislators' Retirement System]," concluding that the pension restriction was an impairment of the legislators' vested pension rights. (*Ibid.*)

While the California Supreme Court references the *Allen v. Long Beach* test in four other decisions, it concluded in each case that the petitioners' vested rights had not been impaired. The *Allen v. Long Beach* test was therefore inapplicable, because it evaluates whether the proposed alteration of an employee's vested pension right is "reasonable."[3] One of those cases, *Allen v. Board of Administration* (1983) 34 Cal.3d 114, frames the *Allen v. Long Beach* test using the word "must" instead of "should": "modification of vested pension rights must be reasonable,

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[2] In *Olsen v. Cory*, this Court also noted that in *Betts v. Board of Administration* it found that "[s]ince no new comparable or offsetting benefit appeared in the modified plan, we held the 1976 statute unconstitutionally impaired the pensioner's vested rights." (*Olson v. Cory* (1980) 27 Cal.3d 532 [609 P.2d 991, 996], underscore added.)

[3] See *Miller v. State of California* (1977) 18 Cal.3d 808, 816 ("[P]laintiff's loss of pension benefits resulted not from an impairment of his vested rights, but from the occurrence of a condition subsequent to the accrual of those rights, namely plaintiff's lawful termination from employment prior to the time when his right to full benefits would have matured."); *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 122 (agreeing with and analogizing the Court of Appeal's analysis in *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, which "reject[ed] the claim that Mrs. Lyon's vested contractual rights has been impaired unconstitutionally."); *Int'l Ass'n of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 303 ("Change in contribution is implicit in the operation of [the City of San Diego's] system and is expressly authorized by that system and no vested right is impaired by effecting such change. In this essential regard, City's retirement system differs from those described in the authorities relied upon by plaintiff, and its reliance thereon is misplaced."); *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 472 ("[A]ny claim under the federal and state contract clauses is without foundation. Clearly, the jailers in this case have no vested right in previous erroneous classifications by the PERS Board.")

must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, must be accompanied by comparable new advantages." (*Id.* at p. 120, underscore added.) The *Marin* court stresses this distinction, concluding that (underscore added):

> It thus appears unlikely that the Supreme Court's use of "must" in the 1983 *Allen* decision was intended to herald a fundamental doctrinal shift. "Should," not "must," remains the court's preferred expression. And "should" does not convey imperative obligation, no more compulsion than "ought."

(*Marin, supra,* 2 Cal.App.5th at p. 699.)[4] Thus, according to the *Marin* court, the constitutional rights of hundreds of thousands of California's public employees are potentially threatened by a decision that bases its reasoning on the Supreme Court's "preferred expression," rather than a full and judicious analysis of this Court's precedential decisions. The Court of Appeal's conclusion is constructed upon a result orientated predisposition, saturated with sources foretelling the collapse of public pensions, and void of consideration for how this Court consistently applies the second prong of the *Allen v. Long Beach* test when considering whether the impairment of a vested right is "reasonable." Instead, the Court of Appeal adopts a box score approach:

> [T]he most persuasive evidence against the Supreme Court intending to impose a quid pro quo standard is circumstantial—the bottom line of who won. The issue in *Allen* was whether pension payments to retired legislators could be reduced pursuant to new statutory and constitutional language. The trial court had concluded that reduction would be contrary to the contract clauses of both state and federal constitutions. (*Allen v. Board of Administration, supra*, 34 Cal.3d 114, 118–119.) The Supreme Court reversed, holding that the reduction was not constitutionally improper. There is nothing in the opinion linking the reduction to provision of some new compensating benefit. If the court intended "must" to have a literal meaning, the retirees would have won. They lost.

(*Marin, supra,* 2 Cal.App.5th at p. 699.)

But in *Allen v. Board of Administration*, this Court analogized its facts to those in *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, concluding that the petitioners' vested rights had not been impaired:

> In thus rejecting the claim that Mrs. Lyon's vested contractual rights had been impaired unconstitutionally, the *Lyon* court explained: "The 1966 restriction preserved the basic character of the earned benefit but withheld a windfall unrelated to its real character. In juxtaposition to the legitimate exercise of ongoing governmental powers, the beneficiaries' rights were measured not by 'rigid literal fulfillment' of the contract, but by its 'just and reasonable purport.' [Citation.] The law-making power chose to confine

[4] Markedly, and likely based upon the considerable and unequivocal precedent of this Court and the Court of Appeal, neither MCERA nor the State argued in their briefs that the second prong of the *Allen v. Long Beach* test is discretionary.

> beneficiaries to the gains 'reasonably to be expected from the contract' and to withhold 'unforeseen advantages' which had no relation to the real theory and objective of the fluctuation provision. Such a choice is not the repudiation of a debt, not an impairment of the contract." [Citations.] We agree.

(*Allen v. Board of Administration, supra*, 34 Cal.3d at pp. 122-123, underscore added.) Consequently, this Court did not apply the *Allen v. Long Beach* test in *Allen v. Board of Administration*, as it found that the 1966 constitutional revision at issue in *Allen v. Board of Administration* – which increased legislative salary, but prohibited the Legislature from utilizing the new, substantially increased salary as a basis for computing the retirement benefits of any legislator who retired before 1967 – "constituted neither the repudiation of any debt nor the unconstitutional impairment of an employment contract." (*Id.* at p. 125.) This Court found that there was no impairment of any vested right for legislators who retired before 1967, and therefore the *Allen v. Long Beach* test was inapplicable, as its purpose is to determine *whether an impairment of a vested right* is "reasonable." Thus, contrary to the Court of Appeal's assertion, there should be "nothing in the [*Allen v. Board of Administration*] opinion linking the reduction to provision of some new compensating benefit" because this Court did not apply the *Allen v. Long Beach* test. Consequently, the Court of Appeal's conclusion that "the bottom line of who won" is "the most persuasive evidence against the Supreme Court intending to impose a quid prop quo standard" is erroneous.

The Court of Appeal adds to the confusion by stating that in "any event, we think there is a 'new benefit' provided by the Pension Reform Act." (*Marin, supra*, 2 Cal.App.5th at p. 699.) The Court of Appeal claimed that while the employees were no longer able to include certain items in their compensation earnable, they nevertheless received a "benefit" because they no longer had to pay any contributions for those items: "Put simply, the new benefit is an increase in the employee's net monthly compensation." (*Id.* at p. 700.) If left published, the Court of Appeal's ruling could work to erode California's long history of protecting vested rights. A court following *Marin* could conclude that an employee received a "benefit" if their benefit was taken away because he/she would have the advantage of no longer needing to pay contributions and would receive a greater paycheck each month as a result.

II. ***Marin* Directly Conflicts with Last Year's Court of Appeal's Decision in *Protect Our Benefits***

The Court of Appeal's conclusion in *Marin* not only rejects this Court's well-established line of cases, it also contradicts its own decisions, including one decided as recently as last year – *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619. In a footnote, the *Marin* court attempts to distinguish *Protect Our Benefits* by contending the opinion only applied to retired employees. (*Marin, supra*, 2 Cal.App.5th at p. 697, fn. 19.) The Court of Appeal is wrong.

At issue in *Protect Our Benefits* was a 2011 initiative measure that amended the charter of the City and County of San Francisco to condition the payment of a supplemental cost of living allowance (COLA) on the retirement fund being "fully funded." (*Protect Our Benefits, supra*, 235 Cal.App.4th at p. 622.) Protect Our Benefits, a political action committee, sought to

invalidate the amendment as an impairment of a vested contractual pension right under the contract clauses of the federal and state Constitutions. (*Ibid.*) The court held the amendment invalid "[w]ith respect to current City employees and employees who retired after the supplemental COLA first went into effect on November 6, 1996" and "[w]ith respect to employees who retired prior to November 6, 1996, we conclude they had no vested contractual right in the supplemental COLA and that consequently, the 2011 amendment may be applied to their pensions." (*Id.* at pp. 622-623, underscore added.) The court, citing to *Allen v. Board of Administration*, explained that "With respect to active employees, … any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, *and, when resulting in disadvantage to employees, must be accompanied by comparable new advantages*." (*Id.* at pp. 628-629, italics in original.) With respect to the current City employees and the employees that retired after 1996, the court held that the "diminution in the supplemental COLA cannot be sustained as reasonable because no comparable advantage was offered to pensioners or employees in return." (*Id.* at p. 630, underscore added.)

The fact that only retired employees actually receive the COLA is immaterial to the decision. The *Marin* decision directly conflicts with the holding in *Protect Our Benefits*, and creates significant future uncertainty. This Court should therefore depublish the *Marin* opinion.

III. *Marin's* Eradication of the Comparable New Advantages Analysis Creates Uncertainty in Determining When an Impairment of a Vested Right Is Reasonable

Marin was wrongly decided and should not remain published because it creates tremendous uncertainty by providing misguided and inconsistent precedent for future cases. The decision conflicts with and drastically undermines over sixty years of California Supreme Court precedent. In so doing, *Marin* creates a fissure in California vested pension rights law, which, left published, will ultimately destabilize the previously solid foundations of vested rights.

The Court should depublish the *Marin* opinion to prevent the inevitable uncertainty that will stem from its ruling. The below decision provides no formula for *when* a future court should elect to engage in a "comparable new advantages" analysis, and therefore eliminates practically all guidance for determining whether an impairment of a vested pension right is "reasonable." Such ambiguity will create unnecessary confusion for administrators of pension systems, public employees, legislators, and courts.

The purpose of the second prong of the *Allen v. Long Beach* test, as documented throughout California case law over the past sixty years, is to provide a barometer for determining when an impairment to a vested right is "reasonable." By eradicating this requirement, the *Marin* court simultaneously confounds any real understanding of what impairments are "reasonable." Left published, the only guidance and requirement is that "alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation." In other words, a court could uphold any impairment to a vested right as "reasonable" as long as the impairment was related "to the theory of a pension system and its successful operation." This Court should depublish the *Marin* decision to prevent such uncertainty.

Finally, the significance of this Court and the Court of Appeal's consistent treatment of applying the second prong of the *Allen v. Long Beach* test over the past six decades should not be understated. Likewise, the courts use of "should" over "must" should not be overstated. In *Legislature v. Eu*, this Court, when evaluating the protection extended by the federal contract clause to public officers, concluded that:

> The *Lyon* court nonetheless concluded, "Certainly the California pension decisions have never rejected the federal clause as a source of protection. *It is now too late to do so. California law places earned pension rights of public officers and employees under the protection of the contract clause regardless of any characterization adopted by the federal courts*." [Citation.]
>
> We agree with *Lyon v. Flournoy, supra*, 271 Cal.App.2d 774, that, in light of prior California decisions consistently extending federal contract clause protection to state public officers, it is simply "too late" to retreat from the clear implication of those holdings. We conclude that the pension restrictions of Proposition 140 are unconstitutional under the federal contract clause as applied to incumbent legislators because they infringe on the vested pension rights of those persons.

The clear implication of this Court's holdings over the past sixty years is that a court must evaluate whether disadvantages to a pension benefit are accompanied by comparable new advantages when determining whether an impairment to a vested right is "reasonable." It would be "too late," and would unquestionably create widespread uncertainty, to hold that such an evaluation is now discretionary.

Plaintiffs and Appellants Marin Association of Public Employees, et al. have filed a petition for review and the Board plans to prepare and serve an amicus curiae letter in support of their petition. However, whether or not petition for review is granted, the Board respectfully requests that this Court depublish the Court of Appeal's opinion.

Respectfully submitted,

Brian J. Bartow
General Counsel

cc: Attached Proof of Service List

Case Name: Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn. Court of Appeal of California, First Appellate District, Division Two
Case No.: A139610

PROOF OF SERVICE

I declare that I am, and was at the time of service of the documents and/or items identified herein, over the age of eighteen (18) years, and am not a party to this action. I am employed in the County of Yolo, State of California, and my business address is 100 Waterfront Place, West Sacramento, California 95605. On October 14, 2016, I caused the following document(s) and/or item(s) to be served:

1. DOCUMENT(S) SERVED:

Request for Depublication

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- ☒ **First-Class Mail** (Code of Civ. Proc. §§ 1013 and 1013a)
- ☐ **Express Mail** (Code of Civ. Proc. §§ 1013(c), (d))
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☐ **Via Facsimile Transmission:** Pursuant to written agreement by the parties, I caused true copies of the document(s) identified above to be served from facsimile machine telephone number (916) 414-1723 to the person(s) and facsimile machine telephone number(s) listed below. The transmission was reported by the sending facsimile machine as complete and without error. (Code of Civ. Proc. §§ 1013(e), (f))

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3. PERSON(S) SERVED:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 14, 2016 at West Sacramento, California.

Brandy McDowell